In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 59

UNITED STATES OF AMERICA, PETITIONER

v.

FIRST NATIONAL CITY BANK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The government's principal arguments are set forth in full in our opening brief. This reply brief will be devoted to answering several points raised by respondents and to rebutting arguments which misconstrue our position.

1. With respect to our first contention (Pet. Br. 10–23), respondent suggests that personal jurisdiction over Omar could be obtained only under a New York statute which became effective almost a year after the present suit was instituted (Resp. Br. 24–25).[1] In addition to the alternatives mentioned in

[1] Any contention that this State "long-arm" statute does not apply to federal proceedings is frivolous. See Rule 4 (d)(7), (e), (f), and (i), Federal Rules of Civil Procedure, and the

our main brief, however, as we observed on petitioning for rehearing in the court of appeals (R. 56), jurisdiction could have been obtained over Omar under prior New York law by service of process on Omar's representatives who performed acts on behalf of Omar within the jurisdiction. New York Civil Practice Act, § 229; see also New York Business Corporation Law, § 307. Moreover, Omar may also be served by reason of its institution of suit in the Tax Court on the identical claims underlying the present collection action. See *Walker* v. *Calada Materials Co.*, 309 F. 2d 74 (C.A. 10); cf. *Lamb* v. *Schmitt*, 285 U.S. 222.

2. Respondent's main challenge to our second contention (Pet. Br. 23–32) is that it constitutes an attempt to "alter and enlarge the obligation which respondent has undertaken to its customers" (Resp. Br. 19). This argument misconceives the government's position. In this case we seek only to enforce one of the many obligations attached by law to debts of any United States corporation, including a banking corporation. Whenever such a corporation contracts to pay a debt only to a specified creditor upon demand in a specified manner or at a specified place, the corporation must pay that debt, notwithstanding the absence of such a demand, if a lienor, garnishor

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Notes thereto by the Advisory Committee on Rules, 28 U.S.C. App., Supp. V, 1588–1591. Section 302(a), New York Civil Practice Law and Rules, has been held constitutional. See *United States* v. *Montreal Trust Co.* (S.D.N.Y.), decided May 1, 1964. (13 A.F.T.R. 2d 1667, ¶ 64–70) (a subsequent opinion applying § 302(a) to particular facts was filed October 20, 1964. A petition for leave to appeal from the latter ruling was filed October 30, 1964.)

or judgment creditor of the original creditor institutes and prevails in a judicial proceeding to collect the debt. In such a proceeding the defense that the original creditor failed to make the agreed-upon demand is not available to the debtor corporation. Nor may it say that payment is being demanded at a different place than that named in the promise. Thus, when a debt is contracted with a United States corporation and one of the debt's conditions is that demand is to be made at one of its branches, domestic or foreign, the right of the creditor to enforce that debt turns on a fulfillment of the condition. But the lienor of such a creditor, in proceeding under the applicable law to foreclose his lien against the property held by the corporate debtor, may enforce his debt against the single corporate entity wherever he finds it without satisfying the condition. And in so enforcing the debt, the lienor merely asserts the same rights which the original creditor might have asserted had he become entitled to enforce the debt.

If enforcement of the debt by the government in New York instead of by the taxpayer abroad would result in a demonstrable burden on respondent's New York operations (Resp. Br. 9, 13–15, 21), the court can presumably allow respondent to make payment to agents of the United States in Montevideo or elsewhere.[2]

[2] Respondent can hardly contend that its main office and its branches are separate entities for purposes of any transfer from Montevideo to New York. Appendix A to its Brief in Opposition to the Petition for Certiorari attempted to indicate that while the injunction was in force respondent had agreed to make certain credits which were payable to Omar in Monte-

3. In an attempt to meet its burden of proof regarding foreign law, respondent has attached to its brief certain documents which were not presented to the district court and which do not appear in the record (Resp. Br. 1a–14a). Apart from the fact that they are *dehors* the record, these documents lack either the specificity or authentication necessary for a proper assessment of the conclusions which they allegedly support. Moreover, if they are to be taken at face value, the opinions expressed in the letters appear to state affirmatively that in certain jurisdictions—including Uruguay—respondent could protect itself against liability if it registered the injunction in the foreign jurisdiction.

We suggest that there is no reason to believe that Uruguayan courts would refuse to recognize a transfer of property effected by a United States court under laws and procedures not shown to have violated the international minimum standards. Certainly if "we consider the converse case[4] it is clear * * *

video payable in New York instead. If the branches were, in fact, separate entities, such a transfer would have violated the injunction's prohibition against "transferring" credits held for Omar's account. Hence it appears that respondent considered the transaction merely as an internal accounting entry within a single "entity."

We note also that this Appendix indicates that 90% of the account described as payable in Montevideo was in dollar deposits. Compare Resp. Br. 9, 13–15, 21; opinion below, R. 41–42, 45, 49.

[4] The converse case is not, as the *amici* suggest (Br. 13), a foreign lien upon the foreign branch of a United States bank, but rather a foreign lien upon the main office of a foreign bank with a United States branch.

that we should take that view of a similar transaction occurring abroad." *Martin* v. *Nadel,* [1906] 2 K.B. 26, 29 (C.A.).[4]

Banco Nacional de Cuba v. *Sabbatino,* 376 U.S. 398, is fully consistent with this conclusion. That case does not alter the general proposition that United States courts will defer to a foreign sovereign's acts with respect to property within or without the foreign state when the international criteria for fair procedure and substance are fulfilled. It merely establishes the further principle that when a transfer of property located solely within the foreign jurisdiction has been effected under the laws of that jurisdiction, our courts will not even inquire whether minimal standards of due process have been met. Surely *Sabbatino* does not stand for the proposition that a court of the United States called upon to act under local law must stay its hand merely because some foreign court may later be able to obtain jurisdiction. See *Railroad Co.* v. *Collector,* 100 U.S. 595, 598–599; *United States* v. *Imperial Chemical Industries,* 105 F. Supp. 215, 228–231 (S.D.N.Y.). Cf. *First National City Bank of N.Y.* v. *Internal Revenue Service,* 271 F. 2d 616, 620 (C.A. 2d); *Johansson* v. *United States* (C.A. 5th), decided September 2, 1964, (64–2 USTC ¶9743, pp. 93,907, 93,911–93,912); *United States* v. *Ross,* 302 F. 2d 831 (C.A. 2d).

4. Respondent and the *amici* assert that American branch banking would be substantially harmed if either of the government's positions were sustained

[4] See Pet. Br. 34, n. 17.

by this Court. It does not appear, however, that any untoward consequences have resulted during the two years since the district court's order. The fact that some potential foreign customers might be "repelled by the extraordinary complexities of our tax system" (Br. *amicus*, 10) does not place respondent or any bank above the legal principles applicable to any other debtor in analogous circumstances. For if the banking industry requires extraordinary protection, it may be obtained by way of Congressional legislation. See *Glass City Bank* v. *United States*, 326 U.S. 265, 268.[5] In the absence of special legislation, it is the responsibility of the Treasury Department to accommodate the United States' tax policies, enforced by the Internal Revenue Service, with its banking policies, which are in the domain of the Comptroller of the Currency and other executive agencies. The Treasury has struck this balance by stating its intention not to reach accounts payable at foreign branches unless the bank is specifically notified at the time of the levy and only if the accounts belong to depositors who are within the jurisdiction of a United States court or consist of funds transferred from the United States to defeat tax collection. See Pet. Br. 41–43. This case falls squarely within those bounds, and it is the only case presently before this Court.

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[5] Compare the exception established by the New York legislature in New York Civil Practice Act, § 916(3), cited by the court below (R. 44–45, n. 9). It appears that the statutes superseding the Civil Practice Act do not contain this legislative extension of the "separate entity" doctrine to attaching creditors. See New York Civil Practice Law and Rules, §§ 6202, 5201(a).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, we respectfully submit that the judgment of the court of appeals should be reversed.

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